No. 480

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IN THE

Supreme Court of the United States

JANUARY TERM, 1951

JAMES HANNA, MARGARET HANNA, JOHN E. LA VECK and ELEANOR LA VECK, co-partners doing business under the name and style of THE HERCULES COMPANY,

Petitioners,

against

The Steamship "METEOR", her engines, etc.,

and

ABE KRAUSE, MAE SCHWARTZ and FRANCES KAY KATOWITZ,

Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM R. FURLONG,
Counsel for Petitioners.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of James Hanna, Margaret Hanna, John La Veck and Eleanor La Veck, co-partners doing business under the firm name and style of The Hercules Co., respectfully shows to this Honorable Court:

1. On or about January 29, 1948 petitioners filed the libel herein in the United States District Court for the Eastern District of New York against the S. S. *Meteor* for labor and material furnished by them to the steamship *Meteor* on May 5th and 6th, 1947 at New York, N. Y. The libel prayed for a decree against said vessel in the amount

of Five Hundred Eighty-five Dollars. The *Meteor* was duly seized by the United States Marshal, and one Abe Krause appeared specially alleging that the vessel was outside of the jurisdiction of the court and that the cause was non maritime. This special appearance was overruled and claimant appeared generally. Some months thereafter Frances K. Katowitz and Mae Schwartz appeared alleging ownership of the vessel by reason of the foreclosure of an early chattel mortgage made by Abe Krause to them. After disposition of several motions addressed to the pleadings, including an appeal by petitioners to the Court of Appeals for the Second Circuit from an order dismissing the claim, the cause came on for trial on the merits before Hon. ROBERT A. INCH, District Judge, on March 10, 1950. At the trial petitioner's claim was conceded subject to the sole defense that it was non maritime in nature and that the court therefore lacked jurisdiction. This defense was sustained and the libel dismissed, the conclusion of law being as follows:

> "The Meteor was a 'dead' ship at the time in question, and no maritime lien arose for the painting service performed by libellants, so that this court is without jurisdiction over the instant suit."

2. On appeal to the United States Court of Appeals for the Second Circuit, this decision was affirmed. In due course the mandate of said Circuit Court of Appeals was filed in the District Court and an order of the District Court was made, making the judgment and decree of the Circuit Court of Appeals the judgment and decree of the District Court.

3. The finding of facts supporting the conclusion as to the lack of admiralty jurisdiction of the District Court is as follows:

"1. On May 5th and 6th, 1947, the Meteor was completely withdrawn from navigation and commerce, and was not used by the owners in the business of carrying cargo or passengers. Prior thereto the vessel was part of the James River Reserve Fleet, consisting of out-of-service vessels, and on March 21, 1947 was purchased by claimant Krause from the United States Maritime Commission. Her United States Coast Guard Certificate of Inspection had expired on June 20, 1946 and there is no evidence of any subsequent renewal. Likewise, her Certificate of Enrollment and License with the Bureau of Customs had expired on June 19, 1946 and was never renewed.

2. On March 23, 1947 the Meteor was towed from Norfolk, Virginia, to Pier 69, East River, New York, where the painting services were performed. On May 21, 1947 the vessel was towed to Whitestone, Long Island, where the berth was found unsafe and on the same day towed back to Pier 69, East River. On June 11, 1947 it was towed from Pier 69, East River to Shooters Island, off Staten Island, New York, and remained there until sold for scrap in 1948.

3. During the entire period that the vessel was in New York, and until it was sold for scrap, it had no crew, no machinery was in operation, and it had no light, heat or power. A survey made on April 1st and 2nd, 1947 showed that the boilers were 'opened up and dry', the generators had been disconnected, and the bearings had been taken apart and preserved in grease. Some of the piping had been disassembled and on the main engine, 'the bearings, the packing rings were all loose', so that 'there would have been a great deal of work to put the engineering part of the ship back into operation'. It was estimated that to open the vessel up for Coast Guard inspection alone would cost $40,000, and to convert the boat into a 'luxurious excursion vessel, meeting the requirements of all inspection bodies' would cost 'somewhere between $500,000 and a

> million dollars'. The above condition of the ship remained unchanged until she was sold for scrap in 1948. Thus, at the time libelants entered into the contract and performed their services, in order for the Meteor to have been returned to navigation and commerce, would have required very extensive repairs and proper documentation."

It was conceded that the *Meteor* was a large vessel afloat of upwards 2,000 tons burden equipped with one hundred forty staterooms and two hundred eighty berths (Record, p. 16). A photograph of the vessel introduced by respondents appears in the record at page 76. Also in the record is uncontraverted testimony that the vessel formerly had been engaged in the carriage of freight and passengers for hire (Record, pp. 29-35), although these respondents had not yet actually employed the vessel for any such purpose at the time petitioner's services were performed. The issue is therefore presented whether or not such activity is essential to the existence of maritime jurisdiction.

4. Your petitioners advance the following reasons why this Honorable Court should grant the prayer of this petition:

(a) Section 971 of Title 46 of The United States Code provides as follows:

> "Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel." 41 Stat. 1005.

The word "vessel" in the foregoing statute is defined in Section 3 of Title One of The United States Code as follows:

"The word 'vessel' includes every description of water craft or other artificial contrivance used or capable of being used as a means of transportation on water."

The price and the contract here involved were found by the trial court to have been agreed upon. The record shows very clearly that the services of petitioners constituted "repairs" and "supplies" according to the common acceptation of those words in admiralty and generally. Therefore if the *Meteor* was a "vessel" as that word is used in Section 971 petitioner's claim falls squarely within the terms of this statute. Section 3 of title 1 above quoted defines the word "vessel" as there issued. The record as well as the facts found show very clearly that the *Meteor* was such a vessel. Hence Section 971 accords a maritime lien to petitioners and maritime jurisdiction is present whether or not the *Meteor* was "dead". The statute contains no such limitation.

(b) The Circuit Court of Appeals for the Fifth Circuit, on April 14, 1950, in the case of *The Scorpio* has adopted and repeatedly reaffirmed the foregoing interpretation in conformity with a long line of decisions in that Circuit consistently applying Section 971 to a vessel in all respects "dead" according to the tests imposed in the instant case. Decisions of the Supreme Court and of other circuits likewise are contrary in principal to the decision in this case as more fully set forth in the brief filed in support hereof. The following is quoted from the opinion of the Court in the case of *The Scorpio, supra:*

"[3] It was not essential to admiralty jurisdiction of the court to show that the Scorpio had hauled any part of the commerce of the world or that it had navigated any of the seven seas. The statute pro-

vides that if it is an 'artificial contrivance used, or capable of being used, as a means of transportation on water', it is a vessel, and, under Section 971 of Title 46 U. S. C. A., any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, upon the order of the owner would have a maritime lien thereon enforceable by a suit *in rem* in admiralty." (At p. 356.)

(c) It is essential to the uniformity of the admiralty jurisdiction and the application of the foregoing federal statutes that these conflicting interpretations be resolved. The special importance of such uniformity has always been recognized by this Honorable Court.

(d) For the reasons advanced in the brief supporting this application, your petitioners are advised and believe that the determinations of the Fifth Circuit properly interpret the law and that the determination of the Circuit Court in the instant case was erroneous.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may issue directed to the United States Circuit Court of Appeals for the Second Circuit commanding that Court to certify and to send to this Court a full and complete transcript of the record of all proceedings of said Court in the above entitled cause, to the end that said cause may be reviewed and determined by this Court as provided by law.

And your petitioner will ever pray,

JAMES HANNA

State of New York, }
County of New York, } ss.:

JAMES HANNA, being duly sworn, deposes and says that he is one of the petitioners herein and is the duly authorized agent of petitioners for the purpose of making this verification, and of subscribing the foregoing petition; that he has read the said petition subscribed by him, and that the facts therein stated are true to the best of his knowledge, information and belief.

JAMES HANNA.

Sworn to before me this
29th day of December, 1950.

EDMUND B. BELLINGER,
Notary Public,
State of New York.
No. 41-0223450 Qualified in Queens County.
Cert. filed with N. Y. Co. Clerk & Reg.
Commission Expires March 30, 1951.

I hereby certify that I have examined the foregoing petition. In my opinion the petition is well founded and the cause is one in which the prayer of the petitioner should be granted by this Honorable Court.

WILLIAM R. FURLONG, JR.

IN THE

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JAMES HANNA, MARGARET HANNA, JOHN E. LA VECK and ELEANOR LA VECK, co-partners doing business under the name and style of THE HERCULES COMPANY,

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONERS' BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI HEREIN

Statement.

This case was tried on the merits pursuant to the mandate of the Court of Appeals for the Second Circuit reversing the judgment of the District Court for the Eastern District of New York granting a motion on the pleadings to dismiss the libel herein. The opinion of the Court of Appeals is reported:

Hanna et al v. *The Meteor et al,* 179 F. 2d 957 decided January 30, 1950.

The opinion of the District Court is reported *Hanna et al.* v. *The SS Meteor,* 92 F. Supp. 530. This was affirmed on appeal by the Court of Appeals for the Second Circuit on the authority of the decision of that court in the first appeal (decided October 6, 1950) without opinion.

Matter Involved.

This is an action in rem to enforce a maritime lien against the *Steamship Meteor* for work, labor and services furnished in painting and wire brushing the vessel. The trial court held that claimants conceded that the work was performed and that the agreed price was five hundred eighty-five dollars, the amount sued for. The findings of fact forming the basis for the denial of jurisdiction are also set forth in that opinion. Certain evidence in the record as to the making and performance of the contract and as to the activities of the owners of the *Meteor* with respect thereto were not deemed relevant under the theory of law applied and for that reason presumably were not included in the findings of the trial court. Respondent's picture of the *Meteor,* Exhibit B, is reproduced in the record at page 76. It was found that the vessel was navigated in tow from Norfolk to New York by sea shortly before petitioners performed their work (May 5th and 6th, 1947) and thereafter about New York Harbor.

The only issue at the trial and on appeal was conceded and found by the court to be the existence of maritime jurisdiction.

Reasons for Allowance of the Writ.

Briefly stated, the reasons for allowance of the writ are:

1. The decisions in the instant case wrongly interpret Section 971 of Title 46 U. S. Code and Section 3 of Title 1, U. S. Code.

2. A clear and presently existing conflict between the decisions of the Fifth Circuit and those in the instant case is involved. The decision in the instant case is also in conflict with decisions of this court.

3. Consideration of the foregoing is required in order to preserve the uniformity of the admiralty law and such uniformity is of special concern to this court.

ARGUMENT

FIRST POINT.

The decisions as well as the federal statutes applicable to this case clearly declare that maritime jurisdiction exists to decree the relief which the libel herein prays for.

The opinion of the Court of Appeals for the Fifth Circuit in the case of the *Scorpio,* 181 F. 2d 356 (decided April 14, 1950) states the argument made by petitioners and the law applicable to this case. On the issue here presented the facts are indistinguishable. The following appears in the opinion in that case:

> "Section 971 of Title 46 U. S. C. A., provides: 'Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, * * * upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.'
>
> And Section 3 of Title 1, U. S. C. A.—a statute that has been in effect since 1866—contains the following definition of the word 'vessel': 'The word "vessel" includes every description of water craft or other artificial contrivance used, *or capable of being*

used, as a means of transportation on water.' (Emphasis supplied.)

In applying the test of the latter statute it must be conceded that whether the craft here be a bomb target boat or a yacht, it was some kind of a 'water craft'. It was afloat. It was towed from St. Mary's, Georgia, to Jacksonville. It was, according to the cross-libel, 'a hull', but whether it had deck, cabin, bridges, super-structure, rudder, auxiliary motor, winches, anchors, and the like, or whether it had ever been equipped with engines, boilers, and power wherewith to navigate, or whether it had ever been navigated either before or during the ownership of the United States, does not appear. The terms 'hull' and 'Navy Bomb Target Boat', as used in the cross-libel, seems to have no specific definitions in the law. As a Navy bomb target it might have been fully equipped to move as a vessel; or it might have been a vessel whose long use and ancient age fitted it for an early one-way voyage to Davy Jones' locker for aught that the record reveals.

[3] It was not essential to admiralty jurisdiction of the court to show that the Scorpio had hauled any part of the commerce of the world or that it had navigated any of the seven seas. The statute provides that if it is an 'artificial contrivance used, or capable of being used, as a means of transportation on water', it is a vessel, and, under Section 971 of Title 46 U. S. C. A., any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, upon the order of the owner would have a maritime lien thereon enforceable by a suit *in rem* in admiralty'' (at p. 358).

It is abundantly clear from the record in this case that the *Meteor* was a vessel within the meaning of Section 3 of Title 1, U. S. C. A.

The following cases among the great weight of authority are indistinguishable from the facts here at issue and are in accord with petitioner's position:

Kilbe v. *Menke,* 121 F. 2d 1013;
New Bedford Dry Dock Co. v. *Purdy,* 258 U. S. 96, 66 L. Ed. 482;
The Denelfred, 59 F. 2d 213;
Quarter Boat No. 130, 19 F. Supp. 419;
Walker Skagseth Food Stores v. *Bavios,* 43 F. Supp. 109;
Hall Scott Motor Co. v. *Universal Ins. Co.,* 122 F. 2d 531;
The Ark., 17 F. 2d 466;
North Pacific Steamship Co. v. *Hall Bros.,* 249 U. S. 119.

As the court stated in the case of *The V-14813,* 65 F. 2d 789, the facts relied upon by the decisions in this suit do not affect maritime jurisdiction:

> "We need not consider whether the building of the bridge was a maritime enterprise. The repairs were for the benefit of the vessel. At the time they were furnished she was not engaged in any venture at all. She was capable of navigation and on navigable waters when the repairs were made. Nothing is shown to take the case out of the general rule. There is no doubt that appellant was entitled to a lien on the barge as well as the tug" (at p. 790).

The services of the libelants in this case were such as to fall within the general classification of repairs and supplies as those words have meaning in the maritime law and in the congressional statutes. In the case of the *Harvard,* 270 Fed. 668, the court said:

> "Some of the work done on the Harvard was evidently actual repair work, in the sense of restoring her to first class condition. Considerable of the work was evidently alteration or furnishing of accommodations, in which the previous condition of the accommodations was not satisfactory, and an

actual enlargement of these accommodations was desired and necessary for her intended use. Such a matter cannot be measured by the amount of money involved alone. It was not reconstruction, as in the case of The Susquehanna, supra, nor can it be said to have been entirely a repair, in the sense of replacing injured or damaged parts. It was, however, repair in the sense in which the word has always been used, both in maritime matters (citations omitted) and in work upon land."

In *The Ark, supra,* the very same work as performed by petitioners here was held to constitute repairs and supplies within the meaning of the foregoing statutes.

In *North Pacific Steamship Co.* v. *Hall Bros. M. R. & S. Co.,* 249 U. S. 119, 63 L. Ed. 510, the court considered the question as to whether or not a contract to repair a vessel which had been raised from the bottom after lying submerged there for several seasons was maritime in character. Such a vessel was certainly a "dead ship" at the time the repairs were made; but jurisdiction was sustained.

No other issues are raised in this case as to the various other provisions in the statute and petitioners' claim therefore falls within the clear and unambiguous meaning thereof as generally interpreted.

SECOND POINT.

The decisions in the Fifth Circuit hereinbefore set forth constitute the proper interpretation of the law applicable to this case.

The foregoing states the overwhelming weight of authority expressed in the decisions dealing with the facts as found and existing in this case. By sheer necessity of law and fact a vessel must be withdrawn from the passenger and freight trade when in need of extensive repairs or

alterations. The admiralty has always maintained its jurisdiction from the time of the launching of a vessel and has continued it during the life of the vessel in accordance with the statutory definition herein before set forth. The decision in the instant case therefore renders the statutes and general admiralty law nugatory in so far as they apply to repairs to vessels other than voyage repairs. The decisions of the Fifth Circuit hereinbefore cited on the other hand are entirely in accord with the admiralty principles and the proper interpretation of the statutes. When applied to the instant case they make it mandatory that the decree herein be reversed.

The Public Bath No. 13, 61 Fed. 692;
Cope v. *Vallette Dry Dock Company,* 119 U. S. 625, 30 L. Ed. 501.

In any event the uniformity of the decisions under the general admiralty law and under the statute hereinbefore referred to is a matter of accepted concern to this honorable Court.

Piedmont & Georges Creek Co. v. *Seaboard Fisheries Co.,* 254 U. S. 1, 65 L. Ed. 97.

LAST POINT.

The petition for writ of certiorari filed in this case warrants the careful consideration of this Honorable Court; and, the petition should be granted.

Respectfully submitted,

WILLIAM R. FURLONG, JR.,
Counsel for Petitioners.

LOGAN CRESAP,
HENRY D. VALENTINE,
of Counsel to Petitioners.

FEB 7 1951
CHARLES ELMORE

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BRIEF FOR CLAIMANTS-RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 184 F. 2d 439. (The de-

cree of the District Court was affirmed in open court "on the authority of Hanna v. S. S. Meteor 2 Cir., 179 F. 2d 957.") The opinion of the District Court is reported in 92 F. Supp. 530.

Jurisdiction

Jurisdiction of this Court is invoked under Title 28 U. S. Code §1254. The judgment of the Court of Appeals was entered on November 3, 1950. The petition for a Writ of Certiorari was filed January 3, 1951.

Statement of the Case

This action to enforce a lien *in rem* against the METEOR was commenced by the filing of a libel and complaint and the seizure of the vessel by the United States Marshal for the Eastern District of New York. Plaintiff's answer denied, among other things, the jurisdiction of the Court over the subject matter of the suit. The alleged services consisted of the painting with one coat of paint of a ten-foot band or strip around the outside of the boat from the guard rail up, five boat davits and the smokestack (Ex. A annexed to libel, R. 25, 26). There was no painting of the hull below the guard rail or on the superstructure. The painting had nothing to do with navigation or commerce or with the operation or seaworthiness of the boat, but merely to make it more presentable-looking for soliciting a sale (R. 60).

The finding of the trial court, which is not now disputed by Petitioners, is that during all the time in question the METEOR was a "dead" ship completely withdrawn from navigation and commerce (R. 105). It had been built in 1899 (Ex. D, R. 80). Abe Krause who was the owner when the painting was done had purchased it from the United

States Maritime Commission (Ex. H, R. 98). When he took title it was part of the James River Reserve Fleet consisting of out-of-service vessels which were laid-up by the Government awaiting sale (Ex. I, R. 102). It had not been operated for an unknown period of time prior to June 20, 1946 when its certificate expired (Ex. C, R. 79). Krause had the boat towed to New York in March of 1947 (R. 59) where it remained until it was sold for scrap and broken up in 1948 (R. 60).

Claimants-Respondents, Schwartz and Katowitz, became owners on June 2, 1948, by virtue of the foreclosure of two chattel mortgages which had been filed with the Register of the City of New York previous to the Libelants' alleged services herein (R. 64).

During all the time the boat was in New York it had no crew, no machinery going, no light, heat or power or operation of any kind (R. 60-61). The condition of the boat is described in some detail in the findings of fact in the District Court's opinion (R. 105-106). The decision of the trial court which was unanimously affirmed by the Court of Appeals was that the alleged services were non-maritime and therefore the subject matter of the action was outside the admiralty jurisdiction of the Court.

Statute Involved

The Ship Mortgage Act (46 U. S. C. §971) provides:

> "Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel."

Question Presented

The question here presented briefly stated is whether the admiralty jurisdiction of the United States Court may be invoked to enforce a non-maritime contract involving a vessel.

ARGUMENT

POINT I

The enforcement of non-maritime contracts is outside the admiralty jurisdiction of the court.

The well-settled law of the admiralty is that contract rights are maritime and within the admiralty jurisdiction only when they relate to a ship as an instrument of commerce or facilitate its use in navigation, and that services to a "dead" ship are not maritime and cannot create a lien enforceable in admiralty.

No. Pacific S. S. Co. v. *Hall Bros. Marine R'y & S. Co.*, 249 U. S. 119;
New Bedford Drydock Co. v. *Purdy*, 258 U. S. 96;
Murray v. *Schwartz*, 175 F. 2d 72 (2 Cir.);
The Poznan, 9 F. 2d 838 (2 Cir.) (reversed on grounds not pertinent here 275 U. S. 117);
Astor Trust Co. v. *E. V. White & Co.*, 241 Fed. 57 (4 Cir.);
Robinson's Handbook of Admiralty Law, p. 180.

The decision in *J. Richardson & Sons* v. *Connors Marine Co.*, 141 F. 2d 226 (2 Cir.) stated at page 228:

> "Since Insurance Co. v. Dunham, 78 U. S. 1, 11 Wall. 1, 26, 20 L. Ed. 90, it has been settled that the criterion

of admiralty jurisdiction as to contracts is whether the contract is maritime, 'having reference to maritime service or maritime transactions.' "

This Court in *New Bedford Drydock Co.* v. *Purdy, supra* (p. 98) put it even more succinctly: "If the agreement between the parties is maritime, there was jurisdiction, otherwise there was none."

At the opening of trial, petitioners agreed that the only issue to be decided to determine the matter of jurisdiction was whether the METEOR was a "dead" ship; that is, withdrawn from navigation (R. 10). The Court's decision having been adverse, petitioners' argument now is that since the METEOR was a "vessel" as defined in Title I, U. S. C. §3, a maritime lien necessarily follows under the Ship Mortgage Act (Act of June 5, 1920, Title 46 U. S. C. §971). If this were so it would be a direct departure from the established law prior to the Act.

Insurance Co. v. *Dunham, supra.*

This Court has stated several times that the Act of June 5, 1920 and its predecessor Act of June 23, 1910, were not intended to change or enlarge the general and traditional principles of the law of maritime liens.

Piedmont & George's Creek Coal Co. v. *Seaboard Fisheries Co.*, 254 U. S. 1;
New Bedford Drydock Co. v. *Purdy, supra;*
Dampskibsselskabet Dannebrog v. *Signal Oil & Gas Co.*, 310 U. S. 268, 280.

The words "or other necessaries" in the Act are *sui generis* and define and limit the services previously enumerated. "Because the ship's need was the source of the

maritime lien it could arise only if the repairs or supplies were necessary". The maritime lien is "*stricti juris*" and will not be extended by construction, analogy or inference. *Piedmont & George's Creek Coal Co.* v. *Seaboard Fisheries Co., supra.*

It is well-established that not all repairs or services to a vessel give rise to a maritime lien. "The same transaction may be maritime in one case and not maritime in another." *Hughes on Admiralty* (2d Ed.) p. 22. For instance, wharfage rendered on a ship in her regular use as a freight earning enterprise is a maritime contract and deemed a necessity within the Act, *The Western Wave,* 77 F. 2d 695 (5 Cir.), cert. den. 296 U. S. 633, while the same service to a ship laid up for the winter, or withdrawn from commerce, is not maritime. *The Poznan, supra; Murray* v. *Schwartz, supra.* A watchman on a vessel, while in port during voyages is regarded as serving under a maritime contract, but if he continues in the same capacity while she is laid up, he has no such contract. *The Poznan, supra,* p. 843; *The General Lincoln,* 24 F. 2d 441, D. C. Md.; *Gonzales* v. *U. S. Shipping Board,* 3 F. 2d 168 (E. D. N. Y.).

Thus, painting of a ship in preparation for navigation or to make it more seaworthy might be regarded as a maritime service, but the painting of a ten-foot band around the hull of a "dead" ship with one coat of paint to improve its appearance for the purpose of soliciting a sale can by no manipulation of language be rightly termed a maritime necessity.

POINT II

There is no diversity among the Circuit Courts upon the question presented here.

The decision of the Court of Appeals for the Fifth Circuit in *The Scorpio,* 181 F. 2d 356, is not in conflict with that of the Second Circuit in the instant case. The holding in the former was that the dismissal *on the pleadings* was erroneous since the allegations in the cross-libel "were insufficient as a matter of law to divest a court of admiralty of the jurisdiction clearly alleged in the libel and admitted in the answer." That case also involved an entirely different point, that is whether the work done in converting a target boat into a yacht was repairs which would be maritime or new construction which would be non-maritime.

The decision that the dismissal was premature was based principally on the holding of this Court in *New Bedford Dry Dock Co.* v. *Purdy,* 258 U. S. 96. That case laid down a fundamental test for jurisdiction which is particularly applicable to the case at bar. It is quoted at page 5 *ante.* If the argument of petitioners herein was correct would it not have been far simpler to say, "if the agreement between the parties involved services to be performed on a 'vessel' as defined by Sec. 3 of Title I U. S. C., then maritime jurisdiction would follow as of course."

None of the other cases cited by libelants deal with the issue at bar. In each the work, labor or service had to do with some element of commercial activity or preparation for navigation.

In view of the argument made by petitioners it seems appropriate to quote the closing paragraph of the opinion in the *Saturnas,* 250 Fed. 407 (2 Cir.):

"This litigation exemplifies a common tendency to regard any floating property used in the performance of contract, as in some sort of pledge or surety for satisfactory performance; such security to be enforced by asserted maritime lien. No such principle is known to the admiralty."

CONCLUSION

The petition presents no conflict among the Circuits and no important questions of federal or of general law. The writ should therefore be denied.

The decision of the Court of Appeals on the issue presented to it was clearly correct. It is not in conflict with any other decisions of this Court or of the Court of Appeals for other Circuits, and accordingly, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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